Malaysian National Insurance Sdn Bhd v Lim Tiok

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-236 OF 1992
LAMIN PCA, CHONG SIEW FAI CJ (SABAH & SARAWAK), PEH SWEE CHIN, EDGAR JOSEPH JR AND MOHD DZAIDDIN FCJJ
8 MARCH 1997

Tort *— Joint tortfeasors — Limitation of liability of tortfeasor — Motor vehicle accident where third party passenger injured — Extent of liability of tortfeasors' insurers — Whether the apportionment of responsibility between tortfeasors limits their individual liability to a third party injured as a result of their actions under their insurance policies — Whether s 80 of the Road Traffic Ordinance 1958 limits an injured third party to collect from an individual tortfeasor the amount he is found responsible — Whether the case Tan Chik bin Ibrahim v Safety Life and General Insurance Sdn Bhd still good law — Road Traffic Ordinance 1958 s 80 (s 91 of the Road Transport Act 1987)*

Insurance *— Motor insurance — Compulsory third party motor insurance — Whether s 80 of the Road Traffic Ordinance 1958 limits the liability of an insurer to pay to an injured third party an amount equal to the proportionate liability of the policy holder — Whether the common law rule of indivisible damage applies — Road Traffic Ordinance 1958 s 80 (s 91 of the Road Transport Act 1987)*

The respondent was a passenger in a vehicle driven by YMC, which was involved in an accident with a vehicle driven by CTW. The respondent suffered serious injuries as a result of the collision, which was due to the negligence of both drivers.

The respondent sued YMC, CTW and the appellant, who was the insurer for the vehicle which CTW drove. In a consent judgment in favour of the respondent, it was agreed that responsibility be apportioned equally between the drivers, with a rider that this order was in no way binding on the respondent.

The respondent contended that by reason of the provisions of s 80(1) of the Road Traffic Ordinance 1958 ('the Ordinance'), the appellant was liable to pay the respondent the total sum payable under the consent judgment, following the common law rule that where the same or indivisible damage is the conjoined effect of separate and independent acts, the persons responsible are independent tortfeasors and each of them is responsible for the whole of the damages sustained by the injured party. The appellant argued that it was liable to pay only half the sum payable under the consent order because the liability was equally apportioned between YMC and CTW, relying upon *Tan Chik bin Ibrahim v Safety Life and General Insurance Sdn Bhd* [1987] 1 MLJ 217 ('*Tan Chik*').

During the trial, the only question argued was whether *Tan Chik* applied. In that case, the Supreme Court had held that the right of a third party in a direct action against insurers against third party risks under a compulsory motor insurance policy could not be more extensive than the risks insured under such a policy. The trial judge decided that *Tan Chik* was distinguishable because in *Tan Chik*,

responsibility between the tortfeasors had been determined and apportioned by the court after a full hearing, whereas in the present case, the apportionment of equal responsibility had been undertaken by consent of the tortfeasors. Hence, judgment was entered in favour of the respondent against the appellant for the total sum payable under the consent judgment. The appellant appealed, stating that the trial judge had erred by distinguishing *Tan Chik*.

Held, dismissing the appeal:

(1) (Per **Lamin PCA**) *Tan Chik* should not be followed for the reasons given in the judgment of Edgar Joseph Jr FCJ (see pp 173I and 174A).

(2) (Per **Lamin PCA**) The examination of the English decisions related to compulsory motor insurance against third parties risks as stated in Edgar Joseph Jr FCJ's decision was affirmed. It was only proper and fair not to penalize the party who had nothing to do with the cause of the accident. He therefore must be fully compensated no matter what the apportionment of liability was. The issue of liability, or more precisely the apportionment of liability, did not influence the decision of this court. It was really a matter between the parties responsible for causing the accident (see pp 174I, 175G and 176A–B).

(3) (Per **Lamin PCA**) The insurers who had been ordered to satisfy the full judgment may avail themselves for contribution under s 10(1) and (2) of the Civil Law Act 1956 ('the CLA'). *Tan Chik* does not address the operation of s 10; perhaps it did not arise in view of the trial judge's judgment in that he did not make any order apportioning damages. His order was limited to the apportionment of liability. The trial judge could not have acted under s 10(2) of the CLA because in 'any proceedings for contribution under this section' the court will only concern itself as to the amount of the contribution and further that was not a 'proceeding for contribution'. It was a suit to enforce the whole judgment against the insurers. Hence the court could depart from *Tan Chik* (see p 176B–E).

(4) (Per **Edgar Joseph Jr FCJ**) The trial judge erred by distinguishing *Tan Chik*, as in terms of efficacy, there was no distinction between a consent order and any other order of the court.

As *Tan Chik* was not distinguishable, it must be decided whether the decision should be applied to the present case or whether it was wrong in law. The court was able to review *Tan Chik* as it felt it was necessary and because it was relevant to the present case. The issue was not merely academic in nature (see p 180B, E–I); *de Lasala v de Lasala* [1979] 2 All ER 1146 and *Food Corp of India v Antclizo Shipping Corp* [1988] 2 All ER 513 followed.

(5) (Per **Edgar Joseph Jr FCJ**) When the relevant legislation, common law and policy were considered, *Tan Chik*, in so far as it held that in a situation involving independent tortfeasors, insurers of motor vehicles against third parties were liable to satisfy judgments obtained against their insured to the extent only of the proportion of responsibility for the accident adjudged against their insured was a decision with which this court was unable to agree and should not be followed (see p 186H); *Tan Chik bin Ibrahim v Safety Life & General Insurance Sdn Bhd* [1987] 1 MLJ 217 not followed.

(6) (Per **Edgar Joseph Jr FCJ**) Sections 75(1), 80(1) and (4) of the Ordinance are derived from s 38 of the UK Road Traffic Act 1930 and s 12 of the UK Road Traffic Act 1934. The underlying purpose of compulsory motor insurance against third party risks was to ensure that innocent third parties who were injured in vehicular accidents were given full and effective protection, regardless of the private insurance arrangement between the insurer and the insured (see p 184F–I); *Harker v Caladonian Insurance Co* [1979] 2 Lloyds' Rep 193 followed.

(7) (Per **Edgar Joseph Jr FCJ**) The language of s 80(1) expressly directs attention to the liability covered by 'the terms of the policy', and thus the policy terms as well as the effect of statutory provisions rendering certain conditions or restrictions of no effect against third parties must be considered. The policy stated in Section II that the appellant would indemnify the insured against all sums to which the insured shall become 'legally liable' to pay in respect of death or bodily injury to any person. The words 'legally liable' were equivalent to 'responsible in law', and in the context of liability insurance, ordinarily means liability to pay a definite sum imposed by a final judgment against an insured or by an award or a settlement by way of an agreement. Furthermore, the policy later stated that the liability limit in regards to Section II was unlimited. Statutorily, s 75(1) of the Ordinance requires the appellant to insure the owner and driver of a motor vehicle against liability incurred as a result of his or their use of the motor vehicle which causes injury to third parties (see pp 183G and 181F–H).

(8) (Per **Edgar Joseph Jr FCJ**) The effect of s 80(1) is to impose unlimited liability on insurers in respect of third party risks. Giving the natural meaning to the words in this section, the purpose of s 80(1) is to give full and effective protection to injured third parties. The court was of the view that it was the total sum payable under a judgment in respect of the liability of an insured to a third party which an insurer is required to pay to the third party. Section 80(1) in effect confers a right on the third party, who has obtained a judgment against an insured, to recover from an insurer what he could have recovered from an insured. Furthermore, s 80(4) states that the insurer, if it

should become liable for an amount which exceeds the amount covered by the policy, is entitled to recover the excess from the insured individual. Hence, even if the policy has a limit on liability, the appellant must still pay the entire amount to satisfy judgments in favour of third parties. When read together, s 80(1) and (4) thus would render any kind of limitation as against third parties void, as the third party could recover the full amount from the appellant insurer (see pp 185G–H, 182H–I and 183A).

(9) (Per **Edgar Joseph Jr FCJ**) In a situation where there are independent tortfeasors with an apportionment of responsibility under an order of the court, the common law rule applies. Hence, if several persons, not acting in concert, commit a tort against another person substantially contemporaneously and causing the same or indivisible damage, each tortfeasor is liable for the same damage. Hence, as YMC and CTW, and vicariously the appellant, were undoubtedly independent tortfeasors and each was liable for the same damage caused, each was liable to pay the total sum of the damages, costs and interest payable under the consent judgment. It followed that as the third party could recover this entire sum from the insured, this was also the sum which the third party was entitled to recover from the appellant insurer (see pp 185I and 186A–D); *Oli Mohamed v Keith Murphy & Anor* [1969] 2 MLJ 244 followed.

(10) (Per **Edgar Joseph Jr FCJ**) The court was also in disagreement with *Tan Chik* in so far as it says that s 80(1) of the Ordinance should be interpreted subject to s 10(1) and (2) of the CLA. It is important that the common law principle, the contribution legislation and the compulsory third party insurance legislation be interpreted in such a manner as to ensure that they work in harmony without injustice. It was difficult to see what relevance s 10(1) and (2) had to the question of the extent of the liability of the insurers against third party risks which was an entirely separate issue depending upon the construction of the relevant compulsory third party insurance legislation and the terms of the relevant contract of insurance. In so far as third party liability is concerned, injured third parties in seeking to enforce satisfaction of a judgment obtained against insurers by virtue of s 80(1) of the Ordinance will not be affected by any order as to the apportionment of responsibility between tortfeasors whether joint or independent (see pp 187I, 188A–B, H–I and 189A).

[Bahasa Malaysia summary

Penentang merupakan seorang penumpang dalam kenderaan yang dipandu oleh YMC, yang terlibat dalam kemalangan dengan kenderaan yang dipandu oleh CTW. Penentang mengalami kecederaan serius akibat perlanggaran, yang berlaku akibat kecuaian kedua-dua pemandu.

A Penentang mendakwa YMC, CTW dan perayu, yang merupakan penanggung insurans untuk kenderaan yang dipandu oleh CTW. Dalam suatu penghakiman persertujuan yang memihak kepada penentang, ia dipersetujui supaya tanggungjawab diagihkan sama rata antara pemandu-pemandu, dengan suatu syarat bahawa perintah ini tidak mengikat penentang dalam apa-apa cara.

B Penentang berhujah bahawa atas peruntukan-peruntukan s 80(1) Ordinan Lalulintas Jalan 1958 ('Ordinan tersebut'), perayu bertanggungjawab membayar penentang jumlah yang harus dibayar di bawah penghakiman persetujuan, menurut rukun common law bahawa di mana kerosakan yang sama atau yang tidak dapat C dibahagikan adalah kesan bergabung tindak-tanduk berasingan dan bebas, orang-orang yang bertanggungjawab adalah pelaku tort bebas dan setiap dari mereka adalah bertanggungjawab atas keseluruhan kerugian yang dialami oleh pihak yang cedera. Perayu berhujah bahawa ia hanya bertanggungjawab membayar setengah daripada D jumlah yang harus dibayar di bawah penghakiman persetujuan sebab liabiliti adalah diagihkan sama rata di antara YMC dan CTW, bergantung kepada *Tan Chik bin Ibrahim v Safety Life and General Insurance Sdn Bhd* [1987] 1 MLJ 217 ('*Tan Chik*').

Semasa perbicaraan, soalan tunggal yang dihujahkan adalah E sama ada *Tan Chik* terpakai. Dalam kes itu, Mahkamah Agung telah memutuskan bahawa hak pihak ketiga dalam tindakan terus terhadap penanggung insurans terhadap risiko pihak ketiga di bawah suatu polisi insurans motor tidak mungkin lebih luas daripada risiko yang diinsuranskan di bawah polisi sedemikian. Hakim perbicaraan memutuskan bahawa *Tan Chik* boleh dibeza sebab dalam *Tan Chik*, F tanggungjawab di antara pelaku tort telah ditentukan dan diagihkan oleh mahkamah selepas pembicaraan penuh, manakala dalam kes ini, pengagihan tanggungjawab setara telah dilaksanakan melalui persetujuan pelaku tort. Maka, penghakiman dimasukkan memihak kepada penentang terhadap perayu untuk jumlah yang harus dibayar penghakiman persetujuan. Perayu membuat rayuan, dengan menyatakan G bahawa hakim perbicaraan telah melakukan kesilapan dengan membeza *Tan Chik*.

Diputuskan, menolak rayuan:

(1) (Oleh **Lamin PMR**) *Tan Chik* tidak patut diikut atas sebab- H sebab yang diberikan dalam penghakiman Edgar Joseph Jr HMP (lihat ms 173I dan 174A).

(2) (Oleh **Lamin PMR**) Penelitian keputusan Inggeris berhubung dengan insurans motor wajib terhadap risiko pihak ketiga seperti yang dinyatakan dalam keputusan Edgar Joseph Jr HMP I disahkan. Adalah wajar dan adil untuk tidak menghukum pihak yang tidak mempunyai apa-apa kaitan dengan punca kemalangan. Oleh itu, dia mestilah dibayar pampasan sepenuhnya tidak kira apakah pengagihan liabiliti. Isu liabiliti, atau dengan lebih tepatnya pengagihan liabiliti, tidak mempengaruhi keputusan mahkamah ini. Ia sebenarnya merupakan suatu perkara di antara pihak-pihak yang

bertanggungjawab mengakibatkan kemalangan itu (lihat ms 174I, 175G dan 176A–B). A

(3) (Oleh **Lamin PMR**) Penanggung insurans yang telah diperintahkan supaya memenuhi penghakiman penuh boleh menggunakan peruntukan-peruntukan di bawah s 10(1) dan (2) Akta Undang-Undang Sivil 1956 ('AUS') untuk mendapatkan sumbangan. *Tan Chik* tidak mempertimbangkan operasi s 10; mungkin ia tidak timbul memandangkan penghakiman hakim perbicaraan bahawa beliau tidak membuat apa-apa perintah yang mengagihkan ganti rugi. Perintah beliau adalah terhad kepada pengagihan liabiliti. Hakim perbicaraan tidak mungkin bertindak di bawah s 10(2) AUS sebab dalam 'apa-apa prosiding untuk sumbangan di bawah seksyen ini' mahkamah hanya akan mempertimbangkan amaun sumbangan dan selanjutnya ianya bukanlah suatu 'prosiding untuk sumbangan'. Ia adalah guaman untuk menguatkuasakan keseluruhan penghakiman terhadap penanggung insurans. Justeru itu mahkamah boleh menyimpang daripada *Tan Chik* (lihat ms 176B–E). B C D

(4) (Oleh **Edgar Joseph Jr HMP**) Hakim perbicaraan melakukan kesilapan dengan membezakan *Tan Chik,* sebab dalam ertikata keberkesanan, tiada perbezaan di antara penghakiman persetujuan dan mana-mana perintah lain mahkamah. E

Oleh kerana *Tan Chik* tidak dapat dibeza, ia mestilah ditentukan sama ada keputusan itu patut terpakai kepada kes ini atau adalah salah dari segi undang-undang. Mahkamah boleh mengkaji semula *Tan Chik* sebab ia fikir adalah perlu dan sebab ia adalah relevan kepada kes ini. Isu itu bukan sekadar akademik sahaja (lihat ms 180B, E–I); *de Lasala v de Lasala* [1979] 2 All ER 1146 dan *Food Corp of India v Antclizo Shipping Corp* [1988] 2 All ER 513 diikut. F

(5) (Oleh **Edgar Joseph Jr HMP**) Apabila perundangan, common law dan polisi yang relevan dipertimbangkan, *Tan Chik*, sejauh mana ia memutuskan bahawa dalam keadaan yang melibatkan pelaku tort bebas penanggung insurans kenderaan motor terhadap pihak ketiga bertanggungjawab memenuhi penghakiman yang diperolehi terhadap pengambil insurans mereka setakat mana kadar tanggungjawab atas kemalangan ditentukan terhadap pengambil insurans mereka adalah suatu keputusan dengan mana mahkamah ini tidak dapat bersetuju dan tidak harus diikut (lihat ms 186H); *Tan Chik bin Ibrahim v Safety Life & General Insurance Sdn Bhd* [1987] 1 MLJ 217 tidak diikut. G H

(6) (Oleh **Edgar Joseph Jr HMP**) Seksyen-seksyen 75(1), 80(1) dan (4) Ordinan tersebut adalah berpunca daripada s 38 Akta Lalulintas Jalan 1930 UK dan s 12 Akta Lalulintas Jalan 1934 UK. Tujuan di sebalik insurans motor wajib terhadap risiko pihak ketiga adalah untuk memastikan bahawa pihak I

A ketiga yang tidak bersalah yang cedera dalam kemalangan kenderaan diberikan perlindungan penuh dan berkesan, tanpa mengira aturan insurans persendirian di antara penanggung insurans dan pengambil insurans (lihat ms 184F–I); *Harker v Caladonian Insurance Co* [1979] 2 Lloyds' Rep 193 diikut.

B (7) (Oleh **Edgar Joseph Jr HMP**) Bahasa s 80(1) secara nyata mengarah perhatian kepada liabiliti yang dilindungi oleh 'terma polisi tersebut', dan oleh itu terma polisi tersebut dan juga kesan peruntukan statutori yang menyebabkan syarat atau sekatan tertentu tidak berkesan terhadap pihak ketiga mesti dipertimbangkan. Polisi tersebut menyatakan dalam Seksyen II
C bahawa perayu akan menanggung rugi pengambil insurans terhadap kesemua jumlah kepada mana pengambil insurans akan menjadi 'bertanggungjawab dari segi undang-undang' untuk membayar berkenaan kematian atau kecederaan fizikal kepada sesiapa. Perkataan-perkataan 'bertanggungjawab dari
D segi undang-undang' sama seperti 'tanggungjawab dalam undang-undang', dan dalam konteks insurans liabiliti, biasanya bermakna liabiliti untuk membayar satu jumlah tertentu yang dikenakan oleh suatu penghakiman muktamad terhadap penanggung insurans atau melalui suatu award atau penyelesaian melalui perjanjian. Tambahan pula, polisi tersebut
E kemudiannya menyatakan bahawa had liabiliti berkaitan dengan Seksyen II adalah tidak terbatas. Dari segi statutori, s 75(1) Ordinan tersebut menghendaki perayu menginsuranskan pemunya pemandu sebuah kenderaan motor terhadap liabiliti yang ditanggung akibat penggunaan kenderaan motor yang
F menyebabkan kecederaan kepada pihak ketiga (lihat ms 183G dan 181F–H).

(8) (Oleh **Edgar Joseph Jr HMP**) Kesan s 80(1) adalah untuk mengenakan liabiliti yang tidak terhad ke atas penanggung insurans berhubung dengan risiko pihak ketiga. Dengan memberikan makna biasa kepada perkataan-perkataan dalam
G seksyen ini, tujuan s 80(1) adalah untuk memberikan perlindungan penuh dan berkesan kepada pihak ketiga yang cedera. Mahkamah berpendapat bahawa ia adalah jumlah keseluruhan yang harus dibayar di bawah suatu penghakiman berhubung dengan liabiliti pengambil insurans kepada suatu
H pihak ketiga yang harus dibayar oleh penanggung insurans kepada pihak ketiga. Seksyen 80(1) sebenarnya mengurniakan hak kepada pihak ketiga, yang telah memperolehi penghakiman terhadap pengambil insurans, untuk mendapat kembali daripada penanggung insurans apa yang dapat dituntut daripada pengambil insurans. Tambahan pula, s 80(4) menyatakan
I bahawa penanggung insurans, jika ia bertanggungjawab atas amaun yang melebehi amaun yang dijamin oleh polisi tersebut, berhak mendapat kembali amaun yang berlebihan daripada pengambil insurans individu. Justeru itu, jika polisi mempunyai

had atas liabiliti, perayu masih harus membayar jumlah keseluruhan bagi memenuhi penghakiman memihak kepada pihak ketiga. Apabila dibaca bersama, s 80(1) dan (4) akan menjadikan sebarang had terhadap pihak ketiga terbatal, sebab pihak ketiga boleh mendapat kembali amaun penuh daripada penanggung insurans iaitu perayu (lihat ms 185G–H, 182H–I dan 183A).

(9) (Oleh **Edgar Joseph Jr HMP**) Dalam keadaan di mana terdapat pelaku tort yang bebas dengan pengagihan tanggungjawab di bawah perintah mahkamah, rukun common law terpakai. Justeru itu, jika beberapa orang, yang tidak bertindak bersama-sama, melakukan tort terhadap seorang yang lain yang pada dasarnya pada masa yang sama dan menyebabkan kerosakan yang sama atau yang tidak dapat dibahagikan, setiap pelaku tort adalah bertanggungjawab atas kerosakan yang sama. Maka, oleh kerana YMC dan CTW, dan secara vikarius perayu, jelas merupakan pelaku tort bebas dan setiap satu adalah bertanggungjawab atas kerosakan sama yang diakibatkan, setiap satu bertanggungjawab membayar jumlah keseluruhan ganti rugi, kos dan faedah yang harus dibayar di bawah penghakiman persetujuan. Ini bermakna bahawa oleh kerana pihak ketiga boleh mendapat kembali jumlah keseluruhan ini daripada pengambil insurans, ini juga merupakan jumlah yang boleh didapat kembali oleh pihak ketiga daripada penanggung insurans yakni perayu (lihat ms 185I dan 186A–D); *Oli Mohamed v Keith Murphy & Anor* [1969] 2 MLJ 244 diikut.

(10) (Oleh **Edgar Joseph Jr HMP**) Mahkamah juga tidak bersetuju dengan *Tan Chik* sejauh mana ia mengatakan bahawa s 80(1) Ordinan tersebut patut ditafsirkan tertakluk kepada s 10(1) dan (2) AUS. Adalah mustahak bahawa prinsip common law, perundangan sumbangan dan perundangan insurans pihak ketiga wajib ditafsirkan dalam cara yang memastikan bahawa mereka berfungsi dengan harmoni tanpa ketidakadilan. Adalah sukar untuk melihat bagaimana s 10(1) dan (2) relevan kepada persoalan takat liabiliti penanggung insurans terhadap risiko pihak ketiga yang merupakan suatu isu yang berasingan pada keseluruhannya yang bergantung kepada tafsiran perundangan insurans pihak ketiga wajib dan terma kontrak insurans yang relevan. Sejauh mana liabiliti pihak ketiga berkenaan, pihak ketiga yang cedera dalam meminta supaya penghakiman yang diperolehi terhadap penanggung insurans menerusi s 80(1) Ordinan tersebut dikuatkuasakan tidak akan terjejas oleh apa-apa perintah atas pengagihan liabiliti di antara pelaku tort sama ada secara bersama atau bebas (lihat ms 187I, 188A–B, H–I dan 189A).]

Notes

For cases on joint tortfeasors, see 12 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 297–299.

A For cases on motor insurance, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 133–214.

Cases referred to

Ainsbury v Millington [1987] 1 All ER 929 (refd)
B *Austin v Zurich General Accident & Liability Insurance Co Ltd* [1945] 1 All ER 316 (refd)
Bankers & Traders Insurance Co Ltd v National Insurance Co Ltd [1985] 1 MLJ 401; [1985] 1 WLR 734 (refd)
Broadlands Properties Ltd v Guardian Assurance Co Ltd (1984) 3 ANZIC 60.552 (refd)
C *Cohen v Jonesco* [1926] 1 KB 119 (refd)
de Lasala v de Lasala [1979] 2 All ER 1146 (folld)
Dingle v Associated Newspapers Ltd & Ors [1961] 2 QB 162 (refd)
Drinkwater & Anor v Kimber [1952] 2 QB 281 (refd)
Food Corp of India v Antclizo Shipping Corp [1988] 2 All ER 513
D (folld)
Girard v Commercial Standard Insurance Co (1944) 152 P (2d) 509 (refd)
Harker v Caledonian Insurance Co [1979] 2 Lloyd's Rep 193 (folld)
Nominal Defendant (Qld) v Taylor (1982) 56 ALJR 698 (refd)
Oli Mohamed v Keith Murphy & Anor [1969] 2 MLJ 244 (folld)
E *Palmer & Anor v Durnford Ford (A firm) & Anor* [1992] 2 All ER 122 (refd)
South American & Mexican Co, ex p Bank of England, Re [1895] 1 Ch 37 (refd)
Sun Life Assurance Co of Canada v Jervis [1944] 1 All ER 469 (refd)
F *Tan Chik bin Ibrahim v Safety Life & General Insurance Sdn Bhd* [1987] 1 MLJ 217 (not folld)
Zurich General Accident & Liability Insurance Co Ltd v Morrison [1942] 1 All ER 529 (refd)

Legislation referred to

G Civil Law Act 1956 s 10(1), (2)
Road Transport Act 1987 ss 9(1), 91(4), 94, 95, 96(1), (2)(a)
Road Traffic Act 1930 s 38 [UK]
Road Traffic Act 1934 ss 10(1), 12 [UK]

H **Appeal from**: Suit No D1–23–121–1987 (High Court, Kuala Lumpur)

Cyrus Das (*Zainur Zakaria* and *S Nanthabalan* with him) (*Zainur Zakaria & Co*) for the appellant.
Khoo Eng Chin (*Khoo & Sidhu*) for the respondent.
I

Cur Adv Vult

Lamin PCA: I have had the privilege of reading the draft judgment of my brother judge Edgar Joseph Jr FCJ and with the greatest of respect, I think

he is right in his conclusion that the decision in *Tan Chik* should not be followed and the present appeal before this court should be dismissed for reasons as discussed therein.

After having read the draft judgment, I did not intend at first to say a word more but on reflection I thought I should add a word or two.

The learned trial judge, in this case, Shaik Daud J (as he then was) had this to say on *Tan Chik*:

> The question is whether the decision in *Tan Chik bin Ibrahim*'s case is applicable in the present case. On going through the Supreme Court case, one very clear distinction stands out. In that case, liability was determined by the High Court on a fifty-fifty basis. The High Court found the rider of the motor Vespa and the driver of the lorry to be equally liable and this was confirmed by the Supreme Court. In the present case, liability was never determined and this is a very clear distinction on the facts of both cases. If the court had ordered liability, say on a fifty-fifty basis, then it is my view that the plaintiff in this case is bound by the decision in *Tan Chik bin Ibrahim*. Since there was no decision on liability, the plaintiff is therefore entitled to go against any of the defendants for full settlement of the judgment.

I must note here in relation to this appeal that there was a consent judgment on liability in the first suit vide Civil Action No P 162/81 entered before Eusoff Chin J (as he then was) on 1 August 1985 on a fifty-fifty basis. I am not concerned at this point with the effect of a consent judgment because it has been dealt with by my brother judge Edgar Joseph Jr FCJ with whose view I concur. The primary issue before this court, if I may so express, is the question of the entitlement of a third party in a personal claim case; and more specifically, whether his claim will be affected or graduated according to the apportionment of liability. In effect, this issue calls in for interpretation of s 80(1) of the Road Traffic Ordinance 1958 (now s 96(1) of the Road Transport Act 1987) which has caused some problem.

The Supreme Court in *Tan Chik* agreed with the trial judge, Ajaib Singh J (as he then was) in his construction of s 80(1) when he said (at p 217):

> Under s 80(1) of the Road Traffic Ordinance 1958, insurers are obliged to satisfy judgments obtained by third parties for damages for the death of or bodily injury to persons in motor accidents involving vehicles which are insured by them against third party risks. In this case, Safety Life & General Insurance Sdn Bhd were duty bound to satisfy the judgment to the extent of 50% which the plaintiff had obtained against their own insured, namely the owner and driver of the motor lorry, but they were not obliged to satisfy the other 50% of the judgment which the plaintiff had obtained against the owner and rider of the motor Vespa, Abdul Aziz bin Ibrahim as they had at no time covered him with any risk in respect of third party liability.

My brother judge Edgar Joseph Jr FCJ has examined the relevant English decisions relating to compulsory motor insurance against third party risks in order to find a solution to the issue at hand and I entirely agree with his reasoning and conclusion. The apparent complexity of the issue as evidenced

A by the efforts to construe the words of the statute such as 'liability covered by the terms of the policy' and 'any sum payable thereunder', etc has no doubt caused some anxiety in the business of insurance (eg *Bankers & Traders Insurance Co Ltd v National Insurance Co Ltd* [1985] 1 MLJ 401, [1985] 1 WLR 734; *Zurich General Accident & Liability Insurance Co Ltd v* B *Morrison* [1942] 1 All ER 529 (CA); *Austin v Zurich General Accident & Liability Insurance Co Ltd* [1945] 1 All ER 316; and *Harker v Caledonian Insurance Co* [1979] 2 Lloyd's Rep 193). Third parties and their dependants have had no less anxiety for their situation is even more precarious. In the context of earlier decisions, may I interject with a couple of straightforward questions. For example, why should the claim of a passenger in a motor C vehicle involved in an accident or an innocent foot passenger — otherwise called the third party — be dependant on the apportionment of liability of those who caused the accident? The innocent passenger never contributes in anyway whatsoever in causing the accident. He also has nothing to do with the vehicle concerned except sitting in it as a passenger. Why should he be penalized by having his claim slashed down according to the liability D as apportioned? Was the trial judge in the instant appeal right when he said that since there was no decision on liability, the plaintiff was therefore entitled to go against any of the defendants for full settlement of the judgment?

On the other hand, if there had been a decision on liability like the E consent judgment, then it would be unfortunate for the plaintiff because he would have to receive less than the full amount because, according to him, he would then be bound by *Tan Chik*. In the case of *Tan Chik*, the learned trial judge decided that the respondent's insurance company was duty bound to satisfy only 50% of the whole judgment which the plaintiff F had obtained against the owner and driver of the lorry because the driver was adjudged 50% at fault. What if the driver was found 30% liable, then the judgment could only be satisfied to the extent of 30%. Suppose the rider of the motor Vespa instead was found to be wholly at fault, I imagine in that situation, the insurer of the driver and owner of the lorry — namely Safety Life & General Insurance Sdn Bhd — would not have to pay Tan G Chik a single cent. It is only proper and fair not to penalize the party who has nothing to do with the cause of the accident. Therefore, he must be fully compensated no matter what the apportionment of liability is.

There is a side issue in *Tan Chik* in the way it was decided and it is this: which insurer is bound to compensate the injured third party? Lee H Hun Hoe CJ (Borneo) (as he then was) said (at p 220):

> The insurer was only responsible to satisfy the judgment against the insured. The insurer was never under any risk in respect of the motor Vespa within the terms and conditions of the policy at the time of the accident. So that the third party cannot expect the insurers to be liable for the judgment obtained against the rider of the motor Vespa.

I

Impliedly, it would be the absent insurer of the rider of the motor Vespa who must come to the rescue in respect of the other 50% if Tan Chik is minded to pursue against him. In the present appeal, there was some confusion in the court below in the matter of liability notwithstanding that

there was a consent judgment on a fifty-fifty basis pronounced by Eusoff Chin J (as he then was). The issue of liability — or more precisely, the apportionment of liability — does not influence the decision of this court. It is really a matter between the parties responsible for causing the accident. The insurers who have been ordered to satisfy the full judgment may avail themselves for contribution under s 10(1) and (2) of the Civil Law Act 1956 ('the CLA'). Nothing was said by the trial judge in *Tan Chik* on the operation of s 10. Perhaps it did not arise in view of his judgment in that he did not make any order apportioning damages. His order was confined only to the apportionment of liability. However, the Supreme Court in *Tan Chik* did say (at p 220):

> Apparently, the trial judge was acting under s 10(2) of the Civil Law Act 1956 under which the court would have power to exempt any person from liability to make contribution or to direct that the contribution to be recovered from any person shall amount to a complete indemnity. The trial judge did not deem fit to exercise his discretion nor was he asked to do so so on the facts of this case.

The trial judge could not have acted under s 10(2) of the CLA because in 'any proceedings for contribution under this section' the court will only concern itself as to the 'amount' of the contribution and further that was not a 'proceeding for contribution'. It was a suit to enforce the whole of the judgment against the insurers. It would have been improper to ask the judge to exercise his discretion and even if he did exercise his discretion, he must not fail to give his reasons. With respect therefore, I agree that we depart from *Tan Chik*.

The trial judge in the present appeal decided that the plaintiff (the respondent in this appeal named Lim Tiok) was 'entitled' to go against any of the defendants for full settlement of the judgment 'since there was no decision on liability'. Lim Tiok, the plaintiff in the first suit (No P 162/81) sued Yap Mun Chuan (the first defendant) the driver of motor lorry NC 3467 in which he himself was only a passenger, together with Chai Ten Wei (the second defendant), the driver of motor lorry No BAP 6167 and the owner of the motor lorry, namely Sykt Kenderaan Central (M) Sdn Bhd (the third defendant). The second and third defendants were insured by the same insurer, namely, Malaysian National Insurance Sdn Bhd, Kuala Lumpur ('MNI') the appellant in the instant appeal. Lim Tiok in the court below chose to sue MNI. Since full settlement of the judgment has been ordered by the trial judge below, this appeal must therefore be dismissed though for reasons different from those of the learned judge.

Edgar Joseph Jr FCJ: The sole question for decision in this appeal concerns the *extent* of the liability of the appellants as insurers against third party risks ('the insurers') who had issued a compulsory motor insurance policy ('the policy') in a direct action brought against them by the respondent, an injured third party ('the third party') for satisfaction of a judgment obtained in a running down action pursuant to s 80(1) of the Road Traffic Ordinance 1958 ('the Ordinance') — now s 96(1) of the Road Transport Act 1987 ('the Act').

A The essential facts underlying this appeal may be shortly stated.

The insurers had issued to Sykt Kenderaan Central (M) Sdn Bhd ('the insured') the policy pursuant to, and in terms complying with, s 75(1) of the Ordinance — now s 91(1) of the Act — whereby they had agreed to indemnify the insured and any authorized driver in the event of B accident caused by or arising out of the use of a motor lorry bearing registration No BAP 6167, of which the insured was the registered owner, against all sums including the claimant's costs and expenses which the insured shall become legally liable to pay in respect of death or bodily injury to any person or damage to property.

C The insurers had, pursuant to s 75(4) of the Ordinance — now s 91(4) of the Act — duly delivered to the insured a certificate of insurance in the prescribed form in respect of the policy.

On 14 October 1977, during the currency of the policy and while the certificate of insurance was in full force and effect, the third party whilst travelling as a passenger in another motor lorry, to wit, NC 3467, driven D by Yap Mun Chuan along Kuala Selangor Road, Sg Piong, Kuala Selangor sustained serious personal injuries as a direct result of a collision involving it and motor lorry No BAP 6167 driven by Chai Ten Wai @ Ah Kow, an authorized driver of the insured within the meaning of the policy. The cause of the collision was due to the negligent driving of both drivers.

E On 11 April 1981, the third party had brought an action in the High Court at Kuala Lumpur, being Civil Action No P 162/81, against Yap Mun Chuan, Chai Ten Wai and the insured — citing them as the first, second and third defendants respectively — to recover damages in respect of his personal injuries, loss and expenses and costs and had duly given F notice thereof in writing to the insurers in terms complying with s 80(2)(a) of the Ordinance, now s 96(2)(a) of the Act.

On 5 June 1986, Ajaib Singh J had awarded a consent judgment in favour of the third party against Yap Mun Chuan, Chai Ten Wai and the insured for the sum of RM125,000 as general and special damages; for the G sum of RM10,000 as cost; and lastly, ordered that liability was to be determined. By a supplemental consent order dated 26 September 1991 awarded by Wan Mohamed J, it was further ordered that responsibility for the injury to the third party be apportioned equally between Yap Mun Chuan on the one hand, and Chai Ten Wai and vicariously the insured on the other, with a rider, that this order was in no way binding on the third H party. In other words, the third party was not a party to the consent judgment to apportion responsibility as aforesaid.

In these circumstances, the argument for the third party was that the liability of Chai Ten Wai and vicariously the insured under the consent judgment dated 5 June 1986 was covered by the terms of the policy. I Accordingly, it was contended that by reason of the provisions of s 80(1) of the Ordinance, the insurers were liable to pay to the third party the total sum payable under the consent judgment dated 5 June 1986 and the amount of costs, following the common law rule that where the same or indivisible damage is the conjoined effect of separate and independent

acts, the persons responsible are independent tortfeasors and each of them is responsible for the whole of the damages sustained by the injured party. A

On the other hand, the insurers argued that they were only liable to satisfy half the sums payable under the consent judgment dated 5 June 1986 by reason of the supplemental consent order dated 26 September 1991 whereby responsibility for the accident had been equally apportioned between Yap Mun Chuan on the one hand and Chai Ten Wai and vicariously the insured, on the other. B

In the court below, the only question argued was whether the decision of the Supreme Court in *Tan Chik bin Ibrahim v Safety Life & General Insurance Sdn Bhd* [1987] 1 MLJ 217 applied. In that case, the (then) Supreme Court had held that the right of a third party in a direct action against insurers against third party risks under a compulsory motor insurance policy could not be more extensive than the risks insured under such a policy. More particularly, the facts in that case were these: C

The plaintiff was a pillion passenger on a Vespa motor scooter which had collided with a motor lorry, as a result of which he had sustained personal injuries. The plaintiff sued the rider of the scooter as well as the owner and driver of the lorry. At first instance, the High Court had held that both the rider of the Vespa and the driver of the lorry were equally responsible for the collision and he apportioned responsibility and the amount of damages payable accordingly. Thereafter, in a direct action against the insurers of the lorry under s 80(1) of the Ordinance (now s 96(1) of the Act), the plaintiff sought to recover the entire sum of damages payable under the judgment aforesaid. The insurance policy of the Vespa rider did not cover passenger liability. D E

In a short but crisp passage in his judgment, the trial judge, Ajaib Singh J held in favour of the defendant insurers on the following grounds (at p 217): F

> Under s 80(1) of the Road Traffic Ordinance, insurers are obliged to satisfy judgments obtained by third parties for damages for the death of or bodily injury to persons in motor accidents involving vehicles which are insured by them against third party risks. In this case, Safety Life & General Insurance Sdn Bhd were duty bound to satisfy the judgment to the extent of 50% which the plaintiff had obtained against their own insured, namely the owner and driver of the motor lorry, but they were not obliged to satisfy the other 50% of the judgment which the plaintiff had obtained against the owner and rider of the motor Vespa, Abdul Aziz bin Ibrahim, as they had at no time covered him with any risk in respect of third party liability. In the circumstances therefore, I held that the plaintiff was in no position to enforce against the defendants that part of the judgment which required the owner and rider of the motor Vespa, Abdul Aziz bin Ibrahim, to pay 50% of the damages awarded. G H

On appeal, the judgment of Ajaib Singh J was upheld. Lee Hun Hoe CJ (Borneo) speaking for the Supreme Court said this (at p 220): I

> The insurer is not bound by statute to pay the third party the judgment given in his favour but only 'any sum payable thereunder'. ... In short, in our judgment, the insurer is under a duty to pay the amount which the

A insured person has been ordered by the trial court to pay the third party including the insured's share of the taxed costs and interest under the judgment.

In this case, the trial judge gave judgment in favour of the third party and apportioned the liability as well as the damages to be paid by the parties. ...

B

In our view, the word 'liability' used in s 80(1) of the Ordinance means 'liability covered by the term of the policy'. Moreover, the right of the third party to enforce a judgment given against an insured person is a right given to him by statute and not under the common law. As such, the right of the third party is subject to the terms and conditions of the insurance policy.

C In holding as aforesaid, Lee Hun Hoe CJ (Borneo) had followed the judgment of the Privy Council in *Bankers & Traders Insurance Co Ltd v National Insurance Co Ltd* [1985] 1 MLJ 401; [1985] 1 WLR 734. In that case, their Lordship of the Privy Council had to consider the liability of an insurer arising under s 80(1) of the Ordinance. Their Lordships concluded D that an insurer could not be held liable in law for a liability which it had not agreed to insure under the terms of the relevant policy. Lord Scarman, speaking for the Board, said this (at pp 402–403; 736–738):

It is plain from the terms of the owner's policy that the owner's insurers were not on risk when the car was being driven by another who had a policy E of his own which covered him. Once it is recognized that only one of the two policies, namely the driver's policy, was on risk when Ko was driving, it becomes plain upon the wording of s 80(1) of the Ordinance that the driver's insurers must satisfy the third parties' judgment.

...

An attempt was made before the Board by counsel for the owner's insurers F to argue that in construing s 80(1) one must disregard the terms of the policy. The submission is flatly contradicted by the language of the subsection which expressly directs attention to the liability covered by 'the terms of the policy'. The Ordinance proceeds upon the basis of the terms of the policy, subject only to the specified exceptions and restrictions contained in ss 78 and 79. No doubt it is for this reason that any person against whom a third G party claims damages for personal injury arising out of a road accident is under a duty to provide the third party with information as to his insurance cover: s 82(1).

In the event, in the present case, the learned trial judge had concluded that *Tan Chik* was distinguishable because in that case, responsibility between H the defendants had been determined and apportioned by the court after a full hearing, *whereas* here apportionment of equal responsibility had been undertaken by consent of Yap Mun Chuan, the insured and its authorized driver Chai Ten Wai. He accordingly held in favour of the third party and entered judgment in his favour against the insurers for the *total* sum payable under the consent judgment dated 5 June 1986. It is from this I judgment that the insurers have appealed to this court.

It would be convenient if, at the outset, we disposed of the point made by the learned trial judge that *Tan Chik* was distinguishable. We note that the understanding on apportionment of equal responsibility for

the accident aforesaid was the subject of a supplemental consent order dated 26 September 1991 entered by Wan Mohamed J, wherein it was expressly stated, ex abundanti cautela, that the third party was not bound thereby. A

It was submitted by counsel for the insurer — and we agree — that in terms of efficacy, there is no distinction between a consent order and any other order of the court: see the case of *de Lasala v de Lasala* [1979] 2 All ER 1146 at p 1155, where Lord Diplock said this: B

> Financial arrangements that are agreed on between the parties for the purpose of receiving the approval and being made the subject of a consent order by the court, once they have been made the subject of the court order, no longer depend upon the agreement of the parties as the source from which their legal effect is derived. Their legal effect is derived from the court order C

Similarly, in *Palmer & Anor v Durnford Ford (a firm) & Anor* [1992] 2 All ER 122, the court had held that a consent order could give rise to a plea of res judicata, relying on *Cohen v Jonesco* [1926] 1 KB 119 at p 125. Another case on the same point is *Re South American & Mexican Co, ex p Bank of England* [1895] 1 Ch 37. D

We regret, therefore, that we are unable to agree with the learned trial judge that there is any distinction in principle between *Tan Chik* and the present case. E

The more difficult question which is of cardinal importance to this appeal is whether, as counsel for the third party contended, *Tan Chik* was wrongly decided; and if it was wrongly decided, whether it should be overruled. Indeed, it was for this very reason that the learned Chief Justice had convened the present quorum of five judges to consider this question. F

In considering this question, we have kept in the forefront of our minds the salutary advice of the House of Lords (Lord Bridge of Harwich, Lord Brandon of Oakbrook, Lord Brightman, Lord Ackner and Lord Goff of Chieveley) in *Food Corp of India v Antclizo Shipping Corp* [1988] 2 All ER 513, that there are two prerequisites to a review by the House; first, the House of Lords should not embark on such a review unless they feel free, if necessary, to depart from the reasoning and the decision and secondly, unless the House is satisfied that it would be of relevance to the resolution of the dispute in the case before them. Their Lordship stressed that they would not embark on an inquiry into an issue which is only of academic interest: see, in particular, *Sun Life Assurance Co of Canada v Jervis* [1944] 1 All ER 469 and *Ainsbury v Millington* [1987] 1 All ER 929: a fortiori, they should not do so where the inquiry involves a review of a previous decision of the House, because it cannot be right to hold, obiter, that such a previous decision was wrong (per Lord Goff at p 516c–d). G H

In our view, the same principles would apply to this court, it being, like the House of Lords, an appellate court of last resort. I

Having cautioned ourselves as aforesaid, we are satisfied that the two prerequisites aforesaid have been met, and that this court should undertake a review of *Tan Chik*.

A policy of insurance against third party risks in relation to the user of a motor vehicle to conform with s 75(1) of the Ordinance must insure the owner and driver of a motor vehicle 'in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the motor vehicle ... on a road ...'. Then follows a proviso which is not material for purposes of the present appeal.

As we have indicated, it is common ground that at the material time, the policy in force was a policy of insurance against third party risks in relation to motor lorry No BAP 6167 which conformed with s 75(1) of the Ordinance.

The policy itself apparently contained insurance cover against any sum for which the insured becomes liable to a third party to pay under any judgment recovered against the insured for death or bodily injury arising out of the use of the lorry No BAP 6167, since the 'liability to third party' clause was as follows:

> Section II — Liability to third parties
>
> 1 The company will subject to the limits of liability indemnify the insured in the event of accident caused by or arising out of the use of the motor vehicle ... against *all* sums including claimant's costs and expenses which the insured shall become *legally liable* to pay in respect of:
>
> (a) death or bodily injury to any person
>
> (b) damage to property. (Emphasis added.)

This point regarding the extent of insurance cover in the case of liability to third parties, is emphasized by the Schedule to the policy which, under the sub-heading 'Limits of Liability', says:

> Limit of the amount of the company's liability under 1(a) of Section II in respect of any one claim or series of claims arising out of one event ... *Unlimited.* (Emphasis added.)

The expression 'legally liable' appearing in the policy has a meaning equivalent to 'responsible in law' (see *Nominal Defendant (Qld) v Taylor* (1982) 56 ALJR 698). It is therefore not unfair to say that 'liability' in law — unless the context otherwise requires — means a duty owed to another enforceable by sanctions. However, when used in the context of liability insurance, it ordinarily means liability to pay a definite sum imposed by a final judgment against an insured (see *Girard v Commercial Standard Insurance Co* (1944) 152 P (2d) 509 at p 513), or by an award or a settlement by way of an agreement (see *Broadlands Properties Ltd v Guardian Assurance Co Ltd* (1984) 3 ANZIC 60.552). So also Shawcross, in his classic work on *Motor Insurance* (2nd Ed) at p 514, commenting on the phrase 'legally liable' appearing in a standard 'liability to third party' clause which — omitting immaterial portions — is identical to that appearing in the policy (reproduced above), says:

> At first sight, the words printed above might seem to suggest that the insurers are only obliged to pay an indemnity in respect of a liability which has been transformed into a judgment debt (cf the provisions of s 10 of the

Road Traffic Act 1934, under which they are obliged to discharge such a liability directly to the third party. See ante, ch V at p 278); in other words, that 'legally liable' (in other policies 'liable at law' and similar expressions are used) means liability which 'shall' after the accident 'become' established in a court of law. It is submitted, however, that this is not the meaning of this clause, since the liability is expressly said to be in respect of death or bodily injury and damage to property. It follows that the obligation to indemnify arises as soon as the liability is incurred (see per Tomlin J in *Hood's Trustees v Southern Union General Insurance Co of Australasia* [1928] Ch 793 at p 800; and see further, ch II, ante, pp 72 et seq as to the meaning of 'indemnity'), but the obligation to pay a sum of money in discharge of the indemnity does not arise until the amount thereof is quantified (ie until the amount of the compensation or damages due to the third party is determined in one way or another, eg by settlement with him or by judgment. In this connection, the case of *Marlion v Bannister* (1933) 47 Ll LR 270, post, ch X, should be noticed).

Now, the duty of insurers to satisfy judgments against persons insured in respect of third party risks is imposed by s 80(1) of the Ordinance, which provides:

> 80(1) If, after a certificate of insurance has been delivered under sub-s (4) of s 75 of this Ordinance to the person by whom a policy has been effected, judgment in respect of any such liability as it required to be covered by a policy under para (b) of sub-s (1) of s 75 of this Ordinance (being a liability covered by the terms of the policy) is given against the insured person, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgments.

The expression 'liability covered by the terms of the policy' appearing in parenthesis in s 80(1) of the Ordinance is defined by s 80(5) — now s 96(5) of the Act — to mean 'a liability which is covered by the policy or would be so covered but for the fact that the insurer is entitled to avoid or cancel, or has avoided or cancelled the policy'.

By s 80(4) of the Ordinance, now s 96(4) of the Act, it is provided that:

> 80(4) If the amount which an insurer becomes liable under this section to pay in respect of a liability of a person insured by a policy exceeds the amount for which he would, apart from the provisions of this section, be liable under the policy in respect of that liability, he shall be entitled to recover the excess from that person.

One effect of s 80(4) of the Ordinance is that since liability of insurers against third party risks under s 80(1) is unlimited, any kind of limitation, whether stipulating that the insured has to pay the first X RM of any liability or that the insurance company would not pay more than Y RM of any liability, or by means of a rateable contribution clause, would be void and ineffective as against a third party who can recover the full amount

from the insurance company. But, the insurance company may have a right of recovery of any excess from its insured. However, it could be objected that such a policy does not comply with the requirements of s 75(1) of the Ordinance (equivalent to s 91(1) of the Act).

Section 80(4) also contemplates a situation where the policy is voidable at common law on the ground of non-disclosure or misrepresentation of material facts and the insurance company has not taken the necessary steps under s 80(3) to obtain a declaration as to non-liability on this ground in time or at all or if the policy is voidable, under a condition of the policy. In such a situation, the insurance company would still be legally obliged to pay a third party in enforcement proceedings brought under s 80(1) but it has a right of recovery from its insured.

We are supported in our views regarding the effect of s 80(4) by the following commentary (which carries the not unformidable authority of McNair J and Mr Stephen Chapman, as he then was) on the effect of the provision in the UK legislation corresponding to our s 80(4), appearing in 22 *Halsbury's Laws* (3rd Ed) at para 773:

> Rights of insurers against their assured: If insurers, by virtue of the provisions relating to payments on judgments, become liable to pay to a third party a sum in excess of what, under the policy, they would be liable to pay to their assured in respect of the relevant accident, they are entitled to recover the excess from the assured. It would seem, therefore, that, where the insurers would not be liable to pay anything under their policy by reason of misrepresentation or non-disclosure giving them a right to repudiate, they are entitled to recover form the assured anything which they are compelled by the statutory provisions to pay, whether or not they seek to obtain the relief which the statutory provisions afford them.

The above passage has been reproduced in 25 *Halsbury's Laws* (4th Ed) at para 753.

Such being the case, it is difficult to see how s 80(4) supports the interpretation of s 80(1) according to *Tan Chik*.

To recapitulate, as the language of s 80(1) expressly directs attention to the liability covered by 'the terms of the policy', in construing the subsection it is necessary to have regard to the terms of the policy (see *Bankers & Traders Insurance Co Ltd v National Insurance Co Ltd*, per Lord Scarman), subject to the statutory provisions rendering certain conditions or restrictions of no effect against third parties (see ss 78 and 79 of the Ordinance — now ss 94 and 95 of the Act and derived from s 38 of the UK Road Traffic Act 1930 and s 12 of the UK Road Traffic Act 1934). Thus, insurers against third party risks, are not obliged to carry a wider scope of liability than they have agreed by their policy to carry.

The next topic we should like to address is the purpose underlying our legislation on compulsory motor insurance against third party risks, which is derived from and follows the language of the corresponding UK legislation. Thus, English cases on this point will provide assistance.

In *Zurich General Accident & Liability Insurance Co Ltd v Morrison* [1942] 1 All ER 529 (CA) at p 540, Lord Goddard referred to the

unsatisfactory situation before the UK Road Traffic Act of 1934 was passed in the following terms:

> Part II of the Road Traffic Act 1934 was passed to remedy a state of affairs that became apparent soon after the principle of compulsory insurance against third party risks had been established by the Road Traffic Act of 1930. That Act and the Third Parties' (Rights Against Insurers) Act, passed in the same year, would naturally have led the public, at least those who were neither lawyers nor connected with the business of insurance, to believe that, if thereafter they were, through no fault of their own, injured or killed by a motor car, they or their dependants would be certain of recovering damages, even though the wrongdoer was an impecunious person. How wrong they were, quickly appeared. Insurance was left in the hands of companies and underwriters, who could impose what terms and conditions they chose. Nor was there any standard form of policy, and any company, which could fulfil the not very onerous financial requirements that were necessary for acceptance as an approved insurer, could hedge the policies with so many warranties and conditions that no one advising an injured person could say with any certainty whether, if damages were recovered against the driver of the car, there was a prospect of recovering against the insurers. ...
>
> In the case of motor car insurance, however, it was the third parties who needed the warning, and unfortunately they had no voice as to the warranties or conditions that were inserted in policies, though it was only because careless drivers held a policy that they were enabled to drive and put other persons in peril. It is not surprising, therefore, that by 1934 Parliament interfered, and by s 10 of the Road Traffic Act 1934 [from which our s 80(1) of the Ordinance is derived], took steps towards remedying a position which to a great extent nullified the protection that compulsory insurance was intended to afford. Generally speaking, s 10 was designed to prevent conditions in policies from defeating the rights of third parties ... .

What therefore appears to be of capital importance in this appeal is the interrelation between ss 75(1), 80(1) and 80(4) of the Ordinance (derived from s 36 of the UK Road Traffic Act 1930 and s 10(1) and (4) of the UK Road Traffic Act 1934, respectively), not forgetting, of course, the provisions of the third party liability clause in the policy (reproduced above) which are statutorily recognized.

The question of construction thus posed is perfectly easy to answer in the context of road accidents where there is *no* apportionment of responsibility between independent tortfeasors. The question is, however, more difficult to answer when, as in the present case, there *is* this complicating factor.

The intention of the United Kingdom legislation of 1934 in the field of compulsory motor insurance against third party risks was undoubtedly to give injured third parties full and effective protection (see Cumming-Bruce LJ in *Harker v Caledonian Insurance* [1979] 2 Lloyd's Rep 193 at p 203).

And in the Court of Appeal, Lord Denning MR the presiding judge in *Harker*'s case — when making a detailed examination of the history and wording of the United Kingdom legislation on compulsory motor insurance

against third party risks — did pronounce upon the effect of s 10(1) of the UK Road Traffic Act 1934. What his Lordship said was this (at p 196):

> They [s 10(1) and (4) of the Road Traffic Act 1934, equivalent to our s 80(1) and (4) of the Ordinance] make the insurance company liable on the statute in respect of the *classes of liability* against which they were bound to insure, but with no limit as to quantum at all. Even if they inserted a limit on the amount payable under the policy, it was of no effect against the third party. But they could recover the excess from the driver or owner of the car. (Emphasis added.)

And, after reproducing s 10(1), Lord Denning added on the same page:

> In that subsection, the words —
>
> '... pay to the person entitled to the benefit of the judgment any sum payable thereunder in respect of the liability ...'
>
> *mean the judgment sum. It is the total 'sum payable thereunder'. I see no justification for limiting those words to a part only of that sum. It is the judgment sum which has to be paid by the insurer.* (Emphasis added.)

It is true that in *Harker*'s case, Lord Denning wrote the dissenting judgment but neither the judges who constituted the majority in the Court of Appeal nor Lord Diplock who spoke for the House of Lords when the matter went on further appeal ([1980] 1 Lloyd's Rep 556) disapproved of the above passages in Lord Denning's judgment. The bone of contention in *Harker*'s case revolved around the effect of certain additional provisions in the British Honduras statute limiting the insurer's liability to third parties to a maximum sum, which are not to be found in the English statute nor in our statute. It is with regard to the effect of these additional provisions in the British Honduras statute that there was a divergence of opinion between Lord Denning and the other judges. Lord Denning's reasoning reflected in the above extracts from his judgment was left untouched and is, therefore, of assistance in deciding the present case, bearing in mind that the relevant provisions of the English statute and our statute are in pari materia.

Having regard to the natural meaning of the words appearing in s 80(1) of the Ordinance and the purpose underlying the legislation for compulsory motor insurance against third party risks in road accidents, which is to give full and effective protection to injured third parties, our view is that it is the *total sum* payable under a judgment in respect of the liability of an insured to a third party which an insurer is required to pay to such third party. In effect, s 80(1) confers a right on a stranger to the insurance contract, that is, a third party who has obtained a judgment against an insured to recover from an insurer what he could have recovered from an insured.

The next question to be logically considered is: what is the sum which the third party could have recovered against the insured in the present case where you have a situation involving independent tortfeasors with an apportionment of responsibility between them under an order of court?

To recapitulate, at common law, if each of several persons, not acting in concert, commits a tort against another person substantially contemporaneously and causing the same or indivisible damage, each tortfeasor is liable for the same damage (see *Oli Mohamed v Keith Murphy & Anor* [1969] 2 MLJ 244 at pp 245 col 2E to 246 col 1A, per Choor Singh J applying *Dingle v Associated Newspapers Ltd & Ors* [1961] 2 QB 162 and *Drinkwater v Kimber* [1952] 2 QB 281).

Here, Yap Mun Chuan, Chai Ten Wai and vicariously the insured, were undoubtedly independent tortfeasors and each was liable for the same damage caused, and therefore *each* is liable to pay the *total sum* of the damages, costs and interest payable under the consent judgment dated 5 June 1986 notwithstanding the fact that responsibility for the accident had been equally apportioned between them under the supplemental consent order dated 26 September1991 (see *Oli Mohamed v Keith Murphy & Anor* at pp 245 col 2E to 246 col 1A). It follows that since this is the sum which the third party can recover from the insured, this is also the sum which the third party is entitled to recover from the insurer. In other words, this is the sum which the insured is 'legally liable' to pay to the third party within the meaning of the 'liability to third party' clause of the policy, reproduced above, and this is also the sum for which the insurer is bound by statute to indemnify the insured.

There is no valid reason for restricting the amplitude of the provisions of s 80(1) that are clearly intended to secure comprehensive protection to drivers of motor vehicles not only for their own good but for the benefit of those who suffer death or injury by the use of such vehicles on the public road.

With respect, the interpretation so eloquently presented by Dr Das on behalf of the insurers, if upheld, could render such protection illusory. Take a case where only one of two independent tortfeasors is insured and the other is uninsured and impecunious or is a friend or relative of the injured third party and uninsured, who the injured third party does not wish to sue; on such an interpretation, an injured third party would not get full and effective protection. No to put too fine a point on it, such an interpretation could result in injustice and defeat the purpose underlying legislation on compulsory motor insurance against third party risks which is to give full and effective protection to injured third parties.

With profound respect, therefore, *Tan Chik* — in so far as it holds that in a situation involving independent tortfeasors, insurers of motor vehicles against third parties are liable to satisfy judgments obtained against their insured to the extent only of the proportion of responsibility for the accident adjudged against their insured — is a decision with which weare unable to agree and should not be followed.

Accordingly, we respectfully agree with Lord Denning MR when he said in *Harker*'s case (at p 196), with reference to s 10(1) of the UK Road Traffic Act of 1934 (equivalent to s 80(1) of the Ordinance), that it makes insurance companies liable on the statute in respect of classes of liability against which they were bound to insure but with no limit as to quantum at all.

A We note Shawcross, in his work on *Motor Insurance* (2nd Ed) at pp 282–283, has made the same point as Lord Denning, though in an amplified form, thus:

> It will be seen therefore that the expression 'a liability covered by the terms of the policy' has two possible meanings:
>
> B (i) It may mean 'a liability in respect of which an indemnity is enforceable under the terms of the policy or which would be so enforceable but for the fact that the insurers are entitled to avoid or cancel the policy' (ie 'terms' in the subsection refers to all classes of terms in the policy).
>
> (ii) It may mean a 'liability within the risks specified in the policy or which would be within the risks specified in the policy but for the fact that the
> C insurers are entitled to avoid or cancel the policy, etc *or are entitled to evade liability thereunder*' (ie 'terms' in the subsection refers only to terms descriptive of risk).
>
> Nevertheless, it is apparent that, if the first meaning is to be given to these words, the whole object of this Part of this Act would be defeated. If only
> D for that reason the second interpretation, however illogical, must be adopted.
>
> It is submitted, therefore, that 'liability covered by the policy' means —
>
> (i) Liability which comes within (or arises out of) a risk apparently insured by the express terms of the policy, *whether or not* it is a ...
>
> (ii) Liability in respect of which the insurers are entitled to refuse an indemnity on the ground that the assured has committed some breach
> E of the terms of the policy.

Similarly, we respectfully agree with Lord Denning when he said — with reference to the words 'pay to the person entitled to the benefit of the judgment any sum payable thereunder in respect of the liability...' appearing in s 10(1) of the UK Road Traffic Act 1934 — that they:

> F ... *mean the judgment sum. It is the total sum payable thereunder.* I see no justification for limiting those words to a part only of that sum. It is the judgment sum which has to be paid by the insurer. (Emphasis added.)

This flatly contradicts *Tan Chik* when it says (at p 220 col 1E):

> G Looking at the wording of s 80(1) of the Ordinance, we cannot say that the learned judge was wrong in his interpretation. The insurer is not bound by statute to pay the third party the judgment given in his favour but only 'any sum payable thereunder'.

At this point, we would interpolate to set the record straight by saying that
H the Supreme Court in *Tan Chik* misread the order of the trial judge Ajaib Singh J when it said (at the same page):

> In this case, the trial judge gave judgment in favour of the third party and apportioned the liability *as well as the damages to be paid by the parties.* (Emphasis added.)

I In truth, although there was an apportionment of liability — in other words, of responsibility — there was *no* apportionment of damages to be paid by the parties concerned.

With profound respect, we must also add that we are unable to agree with *Tan Chik* when it says that s 80(1) of the Ordinance should be

interpreted subject to s 10(1) and (2) of the Civil Law Act 1956 ('the CLA'). Upon the common law principle of fault liability for road accidents in this country, there have been engrafted two statutory measures — one being the provisions for indemnity and contribution between tortfeasors, which is unknown to the common law — namely, s 10(1) and (2) of the CLA — the other being compulsory third party insurance legislation. It is important to fit these three elements — the common law principle, the contribution legislation and the compulsory third party insurance legislation — in such a manner as to ensure that they work in harmony without injustice.

Referring to the unsatisfactory position at common law which led to the introduction of the tortfeasor legislation, Mr OC Mazengarb QC in his deservedly admired work on *Negligence on the Highway* says this (at p 272):

> Prior to the passing of the tortfeasor legislation, one of two or more joint or independent tortfeasors was often in an unfortunate position. He could not secure the joinder of another wrongdoer, and he could not afterwards sue him for a share of the damages which he had helped to cause. Even where judgment had been obtained by the plaintiff against both wrongdoers and execution had been levied against one only, the party who had paid the full bill was unable to sue the other for a share. There was no right of contribution between tortfeasors. Under the reformed procedure, claims for contribution are enforceable between tortfeasors who are liable in respect of the same damage.

And then, on the same page, referring to the procedural changes introduced by the tortfeasor legislation, Mr Mazengarb says this:

> The issue as between two persons who have been responsible for an accident causing damage to another, may now be dealt with in the following ways: *Calvert v Pick* [1954] 1 All ER 566.
>
> (i) in a separate action subsequently brought by one tortfeasor against the other: *White v Carrara Ceiling Co Ltd* [1944] NZLR 577.
>
> (ii) through the machinery of a third party notice issued by a defendant against another person whom he may consider to have been wholly or partly to blame;
>
> (iii) by cross-contribution notices where two defendants are sued; and
>
> (iv) by an application to the trial judge to determine the proportion of damage which each person should pay: *Bell v Holmes* [1956] 3 All ER 449.

Bearing in mind what has just been said, it will be seen that sub-ss (1) and (2) of s 10 of the CLA are concerned with the reformation of procedural law in proceedings against and contribution between joint or several tortfeasors and it is difficult to see what relevance they have to the question of the *extent* of the liability of insurers against third party risks which is an entirely separate issue depending upon the construction of the relevant compulsory third party insurance legislation and the terms of the relevant contract of insurance. In so far as third party liability under the Ordinance is concerned, injured third parties in seeking to enforce satisfaction of a judgment obtained against insurers by virtue of s 80(1) of the Ordinance

A will not be affected by any order as to apportionment of responsibility between tortfeasors, whether joint or independent. However, if a tortfeasor is called upon to pay the full amount in the first instance, his insurer will, of course pay the full amount but his insurer will be subrogated to his right of contribution and should be left ultimately only bearing his due proportion.

B In this result, we would dismiss this appeal with costs, though our grounds for doing so are wholly different from those advanced by the learned trial judge. Deposit to the respondent to account of taxed costs.

Appeal dismissed.

C Reported by K Tang-Wai

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